Filed 4/16/12 P. v. Godinez CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DENISE GODINEZ, Defendant and Appellant.	E053691 (Super.Ct.No. RIF137384) **OPINION**

APPEAL from the Superior Court of Riverside County. Janice M. McIntyre and Rafael A. Arreola, Judges.* Affirmed in part as modified and reversed in part with directions.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

* Retired judges of the Riverside and San Diego Superior Courts, respectively, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution. Judge McIntyre took the plea and denied the motion to withdraw the plea, and Judge Arreola presided over sentencing.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Meagan Beale and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Denise Godinez was with her son and his girlfriend near their vehicle, which broke down on the freeway near Rubidoux. When a California Highway Patrol (CHP) officer stopped to help, defendant presented herself as the driver. She smelled of alcohol. A scuffle ensued involving defendant, her son, the CHP officer, and a Los Angeles Police Department (LAPD) lieutenant who had come upon the scene. During the melee, defendant tried to take the CHP officer's gun and threatened to kill him with it. Defendant entered a guilty plea to several charges, including making criminal threats (Pen. Code, § 422). She filed a motion to withdraw her plea in the lower court, but it was denied.

Defendant now claims on appeal as follows:

1. The trial court abused its discretion by refusing to grant her motion to withdraw her plea filed in the lower court because she was misadvised by counsel as to the collateral consequences of her plea that she was pleading to a strike offense.

2. If this court finds that the plea is valid, the order to pay costs of probation supervision must be reversed or deleted as a condition of probation.

3. The amount of the court security fees must be reduced to comply with the law in effect at the time she sustained the five convictions.

I

PROCEDURAL BACKGROUND

Defendant was charged by the Riverside County District Attorney's Office in an information filed on July 9, 2007, with making criminal threats (Pen. Code, § 422) (count 3); two counts of resisting a law enforcement officer (Pen. Code, § 69) (counts 4 & 5); one count of removing a firearm from a law enforcement officer (Pen. Code, § 148, subd. (d)(1)) (count 6); and one misdemeanor count of driving under the influence (DUI) (Veh. Code, § 23152, subd. (a)) (count 7).[1]

On February 20, 2009, defendant entered a guilty plea to counts 3 through 7. However, the clerk's transcript reflects that defendant pleaded guilty to a misdemeanor violation of Penal Code section 148, subdivision (d)(1) and a felony offense of DUI under Vehicle Code section 23152, subdivision (a), despite not being so charged in the information.

Defendant filed a motion to withdraw the guilty plea through new counsel, which will be discussed in more detail, *post*. The People filed opposition. Defendant's motion to withdraw her guilty plea was denied by the trial court. However, the trial court noted that the plea of guilty to a felony violation of Vehicle Code section 23152, subdivision (a) was not supported by the evidence and issued a nunc pro tunc order that it should be reflected as a misdemeanor violation.

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[1] Defendant was charged with her son Howard Ryan Jordan, who is not a subject of the instant appeal.

On July 30, 2010, defendant filed an appeal and request for a certificate of probable cause from the denial of her motion to withdraw her plea. The request was denied by the trial court as a nonappealable order.[2]

Defendant filed a motion to reduce counts 3, 4, and 5 to misdemeanors pursuant to Penal Code section 17, subdivision (b)(3) based on her inconsequential prior record and mental health issues. The People opposed the motion on the grounds that the crime was serious in nature and that it was an attempt to relitigate the motion to withdraw the plea. The motion was denied by the trial court.

Defendant was granted formal probation for 36 months. She was ordered to pay a $40 court security fee for each count pursuant to Penal Code section 1465.8, for a total of $200. Defendant was also ordered to pay costs of probation supervision pursuant to Penal Code section 1203.1, subdivision (b) in an amount to be determined by the probation department. The amount would be in the range of $591.12 to $3,744, depending upon the level supervision required.

On May 25, 2011, defendant filed her notice of appeal and requested a certificate of probable cause. The trial court granted the certificate of probable cause.

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[2] Defendant appealed to this court, but the appeal was dismissed as premature since sentencing had not occurred.

II

FACTUAL BACKGROUND[3]

On June 8, 2007, approximately 7:00 p.m., a CHP officer came upon a truck and a disabled car parked on the side of the freeway near Rubidoux. The person in the truck was helping the occupants of the disabled car, which included defendant; her son, Jordan; and Jordan's girlfriend. The CHP officer smelled alcohol coming from the car and asked who had been driving. Defendant identified herself as the driver of the car and was instructed by the CHP officer to exit the car. Jordan and his girlfriend were instructed to stay inside the car.

When defendant approached the CHP officer, the officer smelled alcohol. Jordan exited the car and approached the CHP officer with his fists clenched. The CHP officer told Jordan to get back in the car, but instead Jordan attacked the officer. The officer pushed Jordan to the ground and put him in a control hold. Jordan struggled with the officer and hit him in the back.

Defendant attempted to take the CHP officer's weapon from his belt. She screamed, "I'll take it from you. I'll kill you, you motherfucker." The CHP officer was able to get away, but Jordan caught him, and they struggled again. The officer drew his weapon and pointed it at Jordan. Jordan said to the officer, "Shoot me. Shoot me, you motherfucker." Jordan grabbed the gun and put it in his mouth.

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[3] The parties stipulated that the factual basis for the plea would be the probation report.

At this point, an off-duty LAPD lieutenant who had been driving by the scene ran over to assist the CHP officer. Defendant hit the LAPD lieutenant while the CHP officer put Jordan in a control hold. Defendant tried unsuccessfully to run away. Jordan and defendant were eventually arrested.

Once arrested, defendant admitted that she had been driving to her brother's house when the car overheated. She claimed the CHP officer was attacking Jordan, and she was merely protecting him. She stated that she was taking anti-anxiety medication. Jordan's girlfriend confirmed that defendant had been driving the car.

III

MOTION TO WITHDRAW PLEA

Defendant contends that her motion to withdraw her plea should have been granted by the trial court on the ground that she was misadvised by her trial counsel that the criminal threats conviction would be considered a strike in a subsequent proceeding. As such, she received ineffective assistance of counsel and did not knowingly or voluntarily enter into the plea.

A. *Additional Factual Background*

On February 20, 2009, defendant appeared in court with private counsel, Robert Welbourn. Defendant was ready to enter a plea. She advised the trial court that she had reviewed the plea form with her attorney, she had signed and initialed the form, and she understood her constitutional rights on the form. Defendant was also asked if she understood that she was entering a guilty plea to a felony, and she acknowledged that she

understood that portion of the form. Defendant agreed that she was pleading guilty to all counts and that she could receive up to four years four months in state prison.

The trial court also informed defendant that she would be placed on probation and that there would be mental health terms and conditions. The plea was to the court. Defendant then entered her plea as listed in the information to counts 3, 4, and 5, but as to the charge in count 6 of violating Penal Code section 148, subdivision (d)(1), she admitted a misdemeanor, and the Vehicle Code section 23152, subdivision (a) violation in count 7 was admitted as a felony.

On January 27, 2010, defendant filed her motion to withdraw the plea. Defendant had been represented by private counsel, Robert Welbourn, during the plea proceeding but was now represented by the public defender's office. According to the motion, defendant's case had been transferred to mental health court on September 23, 2008. Thereafter, she entered her guilty plea.

According to the motion, Welbourn had improperly listed the charges on the printed plea form, including stating that she had prior DUI offenses when she did not. Further, the motion provided, "[Defendant] was not advised by her counsel or by the Court that this charge was a strike as defined in [Penal Code section] 1192.7[]. In fact, Mr. Welbourn told the Public Defender investigator that 'there were no strikes associated to the case, due [to] the mental health issues[] of the client. (See Declaration of Mr. Kleinman) The transcript is devoid of any discussion or advisement that the [criminal threats] charge was a strike. In fact, [defendant] did not discover that this was a strike

until after the plea was taken. (See Declaration of [defendant])[.]" Defendant stated in her declaration that she would not have entered a guilty plea had she known that the criminal threat charge constituted a strike. She was not informed by either counsel or the trial court that it was a strike. In Kleinman's declaration, he stated, "Mr. Welbourn indicated that there were no strikes associated to [the case], due to the mental health issues[] of the client."

The motion to withdraw the plea was heard on June 4, 2010. Welbourn was called to testify. He had been hired by defendant's family to represent her. Welbourn explained that the representation was "protracted." Defendant and her family were concerned about defendant's son, Jordan, because he had two previous strike convictions. It was important to the family to get the matter transferred to mental health court so Jordan would not receive a sentence of 25 years to life.

Welbourn had filled out the plea form with defendant. He had gone over the form with defendant, and she had initialed the form. He had advised her of her rights and the consequences of the plea. Welbourn stated that the People required that defendant plead to the criminal threat charge in order for the plea to go forward. He was asked if it was his understanding that the criminal threat charge was not a strike. He responded, "I don't remember that being the case. I did talk about the maximum possible custody commitment, which would be 16 months, two years, three years in state prison and that she would . . . or it would be one year in the county jail. Now if it were a strike, I would suppose that . . . I don't remember offhand what criminal threats' range of sentencing is,

but I think that would have been something that I would have told my client." Welbourn recalled speaking with an investigator with the public defender's office and did not remember that he told the investigator that he believed that it was not a strike because of her mental health issues.

Welbourn recalled that the plea was negotiated with the district attorney's office and that the "overlying reason[]" for the plea was to protect her son. The deal was for both defendant and her son. When defendant was told about the deal, she said, "Well, I'm willing to do what's necessary in order to protect my son." Defendant was concerned about the DUI because she told Welbourn that she had not been driving.

Welbourn acknowledged that the information had not charged a felony DUI, but defendant had told Welbourn she had prior DUI convictions. Welbourn did advise defendant that she was going to be in mental health court and did not recall specifically discussing that since they were in mental health court, the criminal threat would probably not be a strike.

Welbourn did not believe that he would have hid the fact that the criminal threat may have been a strike from defendant. Welbourn was not sure whether the criminal threat charge would in fact end up being a strike when it was in mental health court.

Welbourn explained, "It was a package deal. And that, I told my client. And . . . she had to accept . . . the counts that the People had demanded in order for her part of it to also mesh with what they had decided to do . . . ." Welbourn indicated that defendant continued to express concern to pleading to the DUI, but he told her she had to

go through with it because it was a package deal. Welbourn had no recollection as to whether he told defendant that the criminal threats charge would or would not be a strike.

Defendant testified. She recalled going over the plea form with Welbourn "very quick." Defendant denied that she had ever suffered a previous DUI conviction. She did not read that on the plea form. Defendant did not recall specifically pleading guilty to a felony DUI. She claimed, "I can't really say because my mind was not wanting to plead guilty to any of those, so I wasn't really listening to the precise statements [the judge] was making." She was not told by Welbourn that the criminal threat conviction would be a strike. She admitted that she never wanted to plead guilty to the charges because she felt she had not committed the crimes. However, she found out that her guilty plea would be part of a package deal with Jordan. She admitted that she accepted the charges because it was part of a package deal with her son. She claimed that Welbourn and the mental health counselors told her that her charges would be dropped to misdemeanors. She admitted that she heard the charges when they were read to her and that she accepted them.

Keith Kleinman was an investigator with the Riverside County Public Defender's office. Kleinman claimed that Welbourn told him that due to the plea bargain that there would be no strikes because of the mental health issues in the case.

Defendant's counsel argued that the information did not charge the DUI as a felony, and her rap sheet showed that she had not suffered any priors. She contended that

Welbourn was ineffective in advising defendant about the plea, and she should be allowed to withdraw the plea.

The People argued that there must be good cause to withdraw the plea. They further argued that defendant pleaded guilty in order to save her son. They argued that allowing defendant to withdraw her plea would give her son the benefit of the bargain with no consequence to her. They contended that whether or not the criminal threat charge was a strike was not a direct consequence requiring advisement as it was only relevant if she committed another crime.

Defendant's counsel indicated that she might agree with the People if the rest of the charges had been proper, but advising defendant that the criminal threat charge was not a strike because of the mental health issues in conjunction with not properly putting forth the charges amounted to ineffective assistance of counsel. Further, the plea was to the court and was not negotiated with the People.

It appeared to the trial court that the plea was to the court. Further, defendant orally pleaded to all of the charged counts. The trial court properly stated the charges to which she was pleading guilty.

The trial court then found, " . . . I know that it is not a requirement that, on any plea to a strike offense, that the defendant be advised that of the nature of the offense being a strike and further that there may be any future consequences as a result of the plea to a strike. So I don't find an impropriety raising to the level that would allow her to withdraw her plea as to Count 1." Moreover, when the trial court took the plea,

defendant indicated that she had not been threatened, she understood the consequences of the plea, and she was entering the plea voluntarily. The trial court denied the motion to withdraw the plea. The trial court then reduced the DUI to a misdemeanor, finding the evidence did not support the felony conviction.

B. *Analysis*

A guilty plea is valid as long as the record affirmatively shows it is voluntary and intelligent under the totality of circumstances. (*People v. Mosby* (2004) 33 Cal.4th 353, 361.) It is voluntary and intelligent when (1) it is made with the advice of competent counsel; (2) the defendant was made aware of the nature of the charges against him or her; (3) the plea was not induced by harassment, improper threats of physical harm, coercion, or misrepresentations; and (4) there is nothing to show the defendant was incompetent or otherwise not in control of his or her mental faculties. (*Brady v. United States* (1970) 397 U.S. 742, 750-756 [90 S.Ct. 1463, 25 L.Ed.2d 747].)

Penal Code section 1018 provides in pertinent part: "On application of the defendant at any time before judgment . . . the court may . . . for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) "The

general rule is that the burden of proof necessary to establish good cause in a motion to withdraw a guilty plea is by clear and convincing evidence. [Citations.]" (*Id.* at p. 1207.)

"Under long and well-established principles, a trial court is obligated to advise a defendant of the direct consequences of a plea of guilty or no contest to a felony or misdemeanor before it takes the plea. [Citations.]" (*People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1481.) "[P]ossible future use of a current conviction is not a direct consequence of the conviction. [Citations.]" (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457.) The possibility of enhanced punishment in the event of a future conviction is a collateral, rather than a direct, consequence of the conviction. (*People v. Gurule* (2002) 28 Cal.4th 557, 634) A criminal defendant's actual knowledge of the collateral consequences of his or her plea is not a prerequisite to a knowing and intelligent plea. (*People v. Reed* (1998) 62 Cal.App.4th 593, 598.)

Depending on the circumstances of the particular case, however, affirmative misadvisement by trial counsel may constitute ineffective assistance of counsel. (*In re Resendiz* (2001) 25 Cal.4th 230, 235, 240, abrogated on other grounds in *Padilla v.Kentucky* (2010) ___US___ [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284].) In order to establish ineffective assistance of counsel, the defendant "must show that (1) counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; *and* (2) counsel's deficient performance subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re*

Alvernaz (1992) 2 Cal.4th 924, 936-937, citing, among others, *Strickland v. Washington* (1984) 466 U.S. 668, 687-696 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

We review an order denying a motion to withdraw a guilty plea for an abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) If substantial evidence supports the trial court's order denying a motion to withdraw a guilty plea, that decision must be upheld on appeal. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.) We adopt the trial court's factual findings to the extent they are supported by substantial evidence. (*Fairbank,* at p. 1254.)

Clearly recognizing that her trial counsel's failure to advise her of the collateral consequence that the criminal threats charge could be used as a strike in a future proceeding was not a ground for withdrawing her plea, she now claims she was misadvised that the criminal threats charge *was not* a strike. Defendant presumes that Welbourn told her the criminal threats charge did not qualify as a strike and that she would not have entered into the plea had she been properly advised. However, the record does not support such a conclusion.

Defendant herself only declared that she was not advised the criminal threat charge could be a strike. Welbourn did not recall if he advised defendant about the criminal threats charge being a strike or not. Although Webourn discussed with Kleinman that he surmised that the criminal threat charge would not be a strike because defendant was in mental health court, Kleinman did not declare or testify that Welbourn

told defendant this information. Even defendant did not testify that she was told by Welbourn that the criminal threat charge would not be a strike.

Defendant refers to several pages of the record to support her claim she was "misadvised" as to the criminal threat charge. None of the citations to the record support that counsel *told* defendant that she was *not* pleading to a strike. We have reviewed the record and find that although defendant may not have been told that the criminal charge *was* a strike (and there was no affirmative duty on trial counsel to so inform defendant) there is no evidence that she was misadvised that it would *not* be a strike.

Moreover, even if trial counsel misadvised defendant as to the criminal threats conviction not constituting a strike, it does not infect the validity of defendant's guilty plea unless she establishes that she was prejudiced by the misadvisement, i.e., that she would not have entered the plea of guilty had the proper advisement been given. (*People v. Zaidi, supra,* 147 Cal.App.4th at pp. 1488.)

Although there is some confusion as to whether the plea was negotiated with the district attorney's office or was an open plea to the court, defendant readily admitted in her testimony that she entered into the agreement because she believed it was a package deal with her son. Hence, it is unlikely that she would not have accepted the plea even had she been properly advised as to the consequences of the criminal threat charges. Although Welbourn may have made mistakes on the plea form, defendant was read the charges in open court and readily admitted to the charges. The only mistake on the plea was corrected by the trial court, and neither party has contested the change to the plea.

The trial court did not abuse its discretion by denying defendant's motion to withdraw her plea, as there is ample evidence that defendant's plea was entered into knowingly and intelligently. Moreover, had she been advised differently, she has not shown that she would have rejected the plea.

IV

PROBATION COSTS

Defendant contends, assuming we uphold the plea, that the condition of probation that she pay reasonable costs for probation supervision must be stricken because the trial court did not consider her ability to pay the fine.

Pursuant to the probation report, defendant was to "[p]ay the costs of probation supervision pursuant to 1203.1b PC, in the amount of $591.12. If the level of probation supervision is modified, these costs may be increased to an amount not to exceed $3,744.00." At sentencing, the trial court ordered that she would be on "formal probation for 36 months on the conditions indicated on the sentencing memorandum . . . ." Defendant was further informed, "You must comply with all of the other terms and conditions of probation on the sentencing memorandum including participation in a mental health treatment program." Defendant had no questions on the conditions of probation and was willing to accept the conditions of probation.

Defendant and counsel both signed the sentencing memorandum referred to by the trial court. Under a section entitled "court orders that are not conditions of probation" (capitalization omitted), it was stated, "Pay cost of probation supervision in an amount to

be determined by Probation. Based on the level of supervision, the costs will range from $591.12 to $3744. (PC § 1203.1b)."

Penal Code section 1203.1b, subdivision (a), in pertinent part, provides: "In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report . . . and in any case in which a defendant is granted probation . . . the probation officer . . . taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of any probation supervision . . . , of conducting any preplea investigation and preparing any preplea report . . . [, and] of conducting any presentence investigation and preparing any presentence report . . . . The reasonable cost of these services and of probation supervision . . . shall not exceed the amount determined to be the actual average cost thereof. A payment schedule for the reimbursement of the costs of preplea or presentence investigations based on income shall be developed by the probation department of each county and approved by the presiding judge of the superior court. The court shall order the defendant to appear before the probation officer, or his or her authorized representative, to make an inquiry into the ability of the defendant to pay all or a portion of these costs. The probation officer, or his or her authorized representative, shall determine the amount of payment and the manner in which the payments shall be made to the county, based upon the defendant's ability to pay. The probation officer shall inform the defendant that the defendant is entitled to a hearing that includes the

right to counsel, in which the court shall make a determination of the defendant's ability to pay and the payment amount. The defendant must waive the right to a determination by the court of his or her ability to pay and the payment amount by a knowing and intelligent waiver."

The record contains no evidence to support the trial court considered defendant's ability to pay the probation supervision expenses, which is not forfeited by defendant's failure to object below. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397.)[4] Defendant declined to be interviewed by the probation officer; therefore, there is no information in the probation report about any assets or income she had at the time of the sentencing, her education level, or her employment prospects from which this court could imply that she had an ability to pay.[5]

Where the record does not indicate that the probation officer or the trial court made a determination of the defendant's ability to pay probation supervision costs or that the defendant was informed of the right to a court hearing on the ability to pay, it has

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[4] In *People v. McCullough* (2011) 193 Cal.App.4th 864 (review granted Jun. 29, 2011, S192513), which criticized *Pacheco,* the California Supreme Court is considering whether a defendant forfeited an appellate claim due to a failure to object to imposition of a jail booking fee. Here, the People make no argument as to why *Pacheco* does not apply, and we will not make such argument for the People.

[5] Defendant complains that payment of the probation supervision fee was part of the probation conditions, which is impermissible. (See *People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1068 ["any order for payment of probation costs should be imposed not as a condition of probation but rather as a separate order"]. However, the record establishes that this was not a condition of probation. Likewise, upon remand, any costs imposed should not be made a condition of probation.

been held that a remand for the purpose of compliance with Penal Code section 1203.1b is warranted. (See *People v. O'Connell, supra,* 107 Cal.App.4th at pp. 1067-1068.) Here, at the time of sentencing, defendant was ordered to appear for progress reviews in relation to her involvement in mental health court, and this matter could be addressed at such a hearing upon remand.

V

COURT SECURITY FEES

Defendant further contends that the amount of the court security fees was improperly calculated. Defendant contends that at the time she entered her guilty plea on February 20, 2009, the amount of the court security fee under former Penal Code section 1465.8 was $20. When she was sentenced on April 22, 2011, the statute had been amended to the higher amount of $40. Defendant argues her "conviction" occurred when she entered her plea, and the $20 court security fee applies.

According to the probation report, defendant was to pay $150.00 ($30.00 per convicted charge) pursuant to Penal Code section 1465.8. On the sentencing memorandum, it stated that defendant was to pay a court security fee of $30.00 per convicted charge. At the time of sentencing, the trial court imposed the court security fee in the amount of $40 per count, for a total of $200.00, presumably based on the current version of Penal Code section 1465.8.

Current Penal Code section 1465.8, subdivision (a)(1), provides: "To assist in funding court operations, an assessment . . . shall be imposed on every *conviction* for a

criminal offense . . . ." (Italics added.) At the time that defendant pleaded guilty on February 20, 2009, former Penal Code section 1465.8, subdivision (a)(1) set the fee at $20 per conviction. (Stats. 2007, ch. 302, § 18, p. 3086.) However, effective July 28, 2009, the Legislature amended Penal Code section 1465.8 to increase the court security fee from $20 to $30. (Stats. 2009-2010, 4th Ex.Sess., ch. 22, § 29, p. 5346.) Another amendment occurred (current Pen. Code, § 1465.8) effective March 24, 2011, which increased the fee from $30 to $40 until July 1, 2013. (Stats. 2011, c. 10, § 8, p. 212.) Defendant pleaded guilty on February 20, 2009, and was sentenced on April 22, 2011.

In *People v. Alford* (2007) 42 Cal.4th 749, the Supreme Court ruled that the court security fee imposed under Penal Code section 1465.8 is not a criminal penalty. Thus, it is not subject to the statutory prohibition against retroactive application of a newly enacted penal law. (See Pen. Code, § 3.) The court ruled that the imposition of the court security fee does not violate the statutory prohibition against ex post facto laws. The court stated, following the language of Penal Code section 1465.8, that the court security fee could be applied when a conviction occurred after the fee's effective date, regardless of the date the offense was committed. (*Alford*, at p. 754, 757-758.)

The California Supreme Court did not consider in *Alford* whether, when imposing the fee, it applies at the time of conviction or at the time of sentencing. In *People v. Davis* (2010) 185 Cal.App.4th 998, 1001, the court addressed the court facilities fee imposed by Government Code section 70373. It held that, "[i]t has been settled law for

over 250 years that a person stands 'convicted' upon the return of a guilty verdict by the jury or by the entry of a plea admitting guilt. [Citations.]" (*Davis,* at p. 1001.)

We conclude that the court security fee applies at the time of conviction. The "conviction" in this case refers to the entry of defendant's guilty plea on February 20, 2009, which authorized the imposition of a $20 security fee under former Penal Code section 1465.8. Accordingly, we modify the judgment to reflect the proper court security fee of $20 per convicted charge pursuant to the version of Penal Code section 1465.8 in effect at the time of defendant's conviction.

VI

DISPOSITION

The trial court is directed to modify the judgment to reduce the Penal Code section 1465.8 court security fee to $20 for each convicted charge, for a total of $100. The Court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. We further remand the case to the trial court for a determination of defendant's ability to pay the probation supervision fees. We otherwise affirm the judgment in its entirety.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.